Judgment Approved by the court for handing down.

Neutral Citation Number: [2014] EWCA Civ 559

Case Nos: T1/2013/0170 & T1/2013/0234
PTA/10/2011, PTA1/2011,PTA20/2011, PTA/03/2012

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
(Administrative Court)
Lord Justice Lloyd Jones
PTA/01/2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/05/2014

Before:

LORD JUSTICE MAURICE KAY

LORD JUSTICE SULLIVAN

and

LORD JUSTICE BRIGGS

Between:

Mohamed Ahmed Mohamed	**Appellant 1**
CF	**Appellant 2**
- and -	
Secretary of State for the Home Department	**Respondent**

Timothy Otty QC and Daniel Squires (instructed by **Birnberg Peirce**) for **CC**
Danny Friedman QC and **Tom Hickman** (instructed by **Irvine Thanvi and Natas)** for **CF**
James Eadie QC, Andrew O'Connor and Louise Jones (instructed by **Treasury Solicitor**) for the **Respondent**
Hugo Keith QC, Zubair Ahmad and Shaheen Rahman (instructed by **the Special Advocates' Support Office) as Special Advocates**

Hearing dates: 28 January to 30 January 2014

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Approved Judgment

Judgment Approved by the court for handing down.

Lord Justice Maurice Kay:

1. Mohamed Ahmed Mohamed (formerly known as CC) and CF are British citizens. On or about 13 January 2011 they were arrested and detained in Somaliland. Although Somaliland is not a sovereign state in international law, the United Kingdom and many other states and international organisations, including the United Nations, have direct dealings with the administration there which operates independently of Somalia. Mohamed Ahmed Mohamed (to whom I shall now refer to as MAM) and CF are persons who were reasonably suspected by the Secretary of State to be, or to have been, involved in terrorism-related activity. They do not appeal findings to that effect. Their case is that they were arrested and detained in Somaliland and were later deported to the United Kingdom unlawfully and with the collusion of the United Kingdom authorities. Upon their return to the United Kingdom, they were subjected to control orders and, later, to terrorism prevention and investigation measures (TPIMs).

2. The control orders and the TPIMs were considered by way of statutory review by Lord Justice Lloyd Jones at a single hearing in the Administrative Court. He upheld them: [2012] EWHC 2837 (Admin): [2013] 1 WLR 2171. On these appeals, the appellants do not challenge the reasonableness of the Secretary of State's suspicion of terrorism–related activity or the necessity to make the control orders and TPIMs for purposes connected with protecting members of the public from a risk of terrorism. Their primary (but not their only) case is that the control orders and TPIMs should be quashed because they were obtained by an abuse of process. They contend that their position is analogous to that in the case of Mullen [2000] QB 520 in which a conviction for conspiracy to cause explosions and a sentence of 30 years imprisonment were quashed on grounds of abuse of process because Mullen had been unlawfully deported from Zimbabwe following collusion between the authorities in Zimbabwe and the United Kingdom. His successful appeal did not take issue with the charge of which he was convicted. It rested entirely on the unlawful procurement of his presence before the court.

3. Before turning to the substance of the present appeals, I should clarify two points. First, when this case was before the Administrative Court MAM was referred to as "CC". However, he later absconded, in breach of the terms of his TPIM. In addition to the present proceedings, there were ongoing proceedings in the Queen's Bench Division in the form of a claim for damages. An anonymity order in relation to those proceedings was lifted on 2 November 2013. In those circumstances, anonymity is no longer sought in relation to his present appeal. We did wonder whether his appeal should be stayed in these circumstances. However, we were told that, although the legal aid authorities had initially withdrawn his funding on being informed of the position by his legal representatives, an adjudication subsequently reinstated it. In these circumstances, and in view of the fact that CF's appeal would be proceeding in any event, the Secretary of State decided not to invite us to stay or dismiss MAM's appeal. With some reluctance, we allowed it to proceed.

4. Secondly, Lord Justice Lloyd Jones produced both an open and a closed judgment. So shall we. On the central issue of collusion between the United Kingdom and Somaliland authorities, he said in his open judgment:

> "132…The position of the Secretary of State in these proceedings is that she neither confirms nor denies that the UK authorities were involved in the arrest, detention and deportation of [the appellants]. I have addressed these issues with that in mind.
>
> 133. With considerable reluctance I have come to the conclusion that these matters cannot be addressed in my open judgment. However, I have addressed these matters in detail in my closed judgment."

5. Nevertheless, he assumed "for present purposes" that the arrest, detention and deportation of the appellants were not in accordance with Somaliland law (paragraph 134). However, he concluded that, "having regard to the entirety of the open and closed evidence", neither the control orders nor the TPIMs were "offensive to the court's sense of justice and propriety", nor would upholding them "undermine public confidence in the legal system or bring it into disrepute" (paragraph 135).

1. Abuse of process

6. In his open judgment Lord Justice Lloyd Jones summarised the core allegations advanced on behalf of MAM in support of his case on abuse of process. He enumerated them as follows (at paragraph 78):

> "(1) The Security Service was aware of [MAM's] presence in southern Somalia since 2007 and yet took no steps to seek his extradition or arrest prior to December 2010, despite viewing him as a serious threat to national security.
>
> (2) On becoming aware by 22 December 2010 of [MAM's] impending travel to Somaliland, the Security Service saw such travel as an opportunity to bring restrictive measures against him either in Somaliland or in the United Kingdom.
>
> (3) The Security Service, either alone, or with the United Kingdom Special Forces, then conducted a joint operation with Somaliland authorities to detain [MAM].
>
> (4) The Security Service either knew that the planned operation had no basis in the law of Somaliland or Somalia and/or international law, or at best was recklessly indifferent to such legality and took no steps to ascertain whether it had any such basis. Given what must have been appreciated as to the risks of abuse following detention, serious breaches of the United Kingdom criminal law may also have occurred.

> (5) The Security Service then participated actively in the interrogation of [MAM], despite knowledge that he had been abused and that he remained exposed to a risk of further abuse. Again, serious issues as to breach of domestic and international law as well as local law arise.
>
> (6) The Security Service knew from the outset that there were real problems facing any prosecution of [MAM] in Somaliland because of the absence of available evidence and its preferred option from the outset was (or the very least swiftly became) that he be forcibly returned to the United Kingdom so that he could be placed under a control order.
>
> (7) The Security Service advocated that course of forced return with the Somaliland authorities, despite knowing deportation to the United Kingdom might, or would, be unlawful if [MAM's] preferred option was to remain in Somalia. Again, the UK authorities either knew deportation was unlawful or were recklessly indifferent as to whether this was the case.
>
> (8) Together with other UK agencies the Security Service then facilitated the removal itself, by permitting the grant of travel documents, paying for [MAM's] return flight and ensuring his supervision first by the Somaliland authorities and then by Emirate authorities.
>
> (9) [MAM] was in fact subjected to an unlawful arrest, unlawful abuse on arrest, unlawful detention and unlawful deportation. He was the victim of breaches of both local law and international law and the UK authorities, through at least the Security Service, knew this to be the case or were recklessly indifferent as to whether this was so.
>
> (10) But for the unlawful conduct to which he has been subjected, [MAM] would not be in this jurisdiction to face these proceedings and neither a control order nor a TPIM would have been served upon him."

7. Turning to CF, Lord Justice Lloyd Jones summarised the stages at which he alleges unlawful conduct by the United Kingdom authorities in his case as follows:

> "(1) The UK liaison with Security Services or other officials in Somaliland prior to the [appellant's] apprehension on 14 January 2011.
>
> (2) The apprehension on 14 January 2011 during which UK personnel were involved.

> (3) The period between the apprehension on 14 January 2011 and arrival at Hargeisa Prison on 15 January 2011 during which UK personnel may have remained involved.
>
> (4) The interrogation and detention in Hargeisa Prison between 15 January and 12 March 2011 during which UK personnel provided questions, shared evidence and may have been present on or nearby the prison site.
>
> (5) The removal from Somaliland to the United Kingdom via Dubai on 13 and 14 March 2011 which is an act of an unrecognised state that cannot be recognised by a UK court and is otherwise not in accordance with Somaliland law.
>
> (6) The conduct of Schedule 7 interviews in Heathrow Airport on 14 March 2011 where it was known the [appellants] had recently suffered ill-treatment and arbitrary detention.
>
> (7) The Ministerial submissions of the Secretary of State prior to the decision to apply for a control order on 12 April 2011 and/or the application to Silber J with regard to CF's control order on 13 April 2011".

In addition CF adopted the submissions made on behalf of MAM.

8. It seems that the Secretary of State had become aware in December 2010 that MAM, who had left the United Kingdom in 2007, planned to travel to Somaliland in December 2010. On this basis, the Secretary of State first applied for permission to make a control order, which permission was granted on 23 December 2010. In the event, MAM did not travel to Somaliland at that time but did so in January 2011. On 13 January 2011 the Secretary of State again sought permission to make a control order and this was granted by Silber J on that day. As I have related, MAM was arrested in Somaliland on 14 January 2011, detained there until 13 March 2011 and then removed to the United Kingdom, arriving on 14 March 2011, whereupon the control order was immediately served upon him. Following the change in the statutory provisions, the control order was replaced by a TPIM on 16 January 2012 and this was served on MAM on 21 February 2012. As regards CF, he had been prosecuted in this country in April 2008 for an offence under section 5(1)(a) of the Terrorism Act 2006. It was alleged that he had attempted to travel to Afghanistan for the purposes of engaging in acts of terrorism. He was acquitted at trial in June 2009, but by that time and in breach of his bail conditions, he had absconded to Somalia. He was detained with MAM in Somaliland on 14 January 2011 and was returned to the United Kingdom at the same time as MAM. Upon return he was imprisoned for absconding in 2009. When he was released from prison on 11 May 2011, he was served with a control order. This was replaced by a TPIM on 16 December 2011.

9. I have referred to the laconic terms in which the abuse of process application was rejected by Lord Justice Lloyd Jones in his open judgment. Apart from referring to an assumption that the arrests, detentions and deportations had not been "in accordance

with Somaliland law", it does not disclose whether the allegations of collusion by the United Kingdom authorities and mistreatment in the form of torture during interrogation in Somaliland were accepted or rejected. As the open judgment makes clear, these matters are addressed in detail in the closed judgment. What the open judgment established was that (1) the assumed breaches of Somaliland law in relation to arrest, detention and deportation were not sufficient to render the current proceedings an abuse of process and that the Mullen line of authority was distinguishable; and (2) having regard to "the entirety of the open and closed evidence", there was no abuse of process.

The appellants' case on abuse of process

10. Although the appellants' allegations are very serious and raise important legal issues, the jurisprudential framework in which they fall to be considered is quite narrow. The difficulty is to define its boundaries. The complaints are essentially twofold: first, that the appellants were denied even the gist of the Secretary of State's case on abuse of process, most importantly on the issues of collusion and mistreatment, such as to enable them to give instructions to enable that case to be met; and, secondly, that, as a result of the judge's decision to deal with that aspect of the case exclusively in his closed judgment, the appellants do not know why they lost. In particular, they do not know to what extent their allegations of collusion and mistreatment were accepted or rejected, or whether their failure was based on a point of law. It is submitted that not only have they been denied procedural fairness on this issue, but also the public interest in showing the extent to which their allegations were accepted or rejected has been unlawfully frustrated.

11. The starting point for the submissions of Mr Timothy Otty QC (supported by Mr Danny Friedman QC) is Secretary of State for the Home Department v AF (No. 3) [2010] 2 AC 269. The context there was the requirement of disclosure to a controlee of the gist of the allegations against him. The House of Lords was concerned to interpret and apply the decision of the Grand Chamber of the European Court of Human Rights (ECtHR) in A v United Kingdom (2009) 49 EHRR 625. Lord Phillips (whose speech is essentially the ratio of the case) identified the essence of the Grand Chamber's decision to be contained in the final sentence of paragraph 220 of its judgment:

> "Where… the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 (4) would not be satisfied."

(A was an Article 5 case involving a deprivation of liberty, whereas AF (No. 3) was considered by reference to article 6 because control orders were intended to restrict, but not result in, a deprivation of liberty). At paragraph 59 of his speech, Lord Phillips added:

> "I am satisfied that the essence of the Grand Chamber's decision lies in paragraph 220 and, in particular, in the last sentence of that paragraph. This establishes that the controllee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed material, the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be."

12. In the present case, prior to the final hearing in the Administrative Court and the judgment with which we are directly concerned, there had been a preliminary hearing before Ouseley J at which he had held that AF. (No 3) applies to disclosure by the Secretary of State of the allegations made against the controlee but not to the case for the Secretary of State in relation to allegations by the controlee in support of an abuse of process allegation: [2012] EWHC 1732 (Admin) at paragraphs 27-30. The final judgment of Lloyd Jones LJ was faithful to that analysis. It remains the core of the case for the Secretary of State in this appeal.

13. After this case left the Administrative Court, the ECtHR decided El-Masri v Former Yugoslav Republic of Macedonia (2013) 57 EHRR 25 which concerned an allegation of "extraordinary rendition". It is relied upon by the appellants in the present case because it addresses not only the interest of the affected person but also the public interest. The Court said:

> "191…the court wishes to address another aspect of the inadequate aspect of the investigation in the present case, namely its impact on the right to the truth regarding the relevant circumstances of the case. In this connection it underlines the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what happened. The issue of "extraordinary rendition" attracted worldwide attention…
>
> 192…However, while there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its

> results to secure accountability in practice as well as in theory. As the Council of Europe stated in its guidelines of 30 March 2011 on eradicating impunity for serious human rights violations,
>
> > 'impunity must be fought as a matter of justice for the victims, as a deterrent to prevent new violations and to uphold the rule of law and public trust in the justice system.'
>
> …"

14. The case for the appellants is that, once it is accepted that there is an abuse of process jurisdiction in control order and TPIM cases (as it now is), it attracts the principles expanded in AF (No. 3), and El-Masri and, to an extent, the common law requirement of reasons as explained in English v Emery Reimbold & Strick Ltd [2002] 1 WLR 302. As to the latter, whilst it is accepted that the requirement is modified by a statutory closed material procedure, the complaint is that that does not permit the entire reasoning on a fundamental issue to be contained in a closed judgment.

15. On behalf of the Secretary of State, Mr James Eadie QC makes a number of submissions, of which the following seem to be the most important. First, as I have related, he submits that AF (No. 3) is concerned only with allegations against the suspected terrorist and not with the Secretary of State's case in opposition to an allegation of abuse of process. Secondly, it is said that, by reason of the Secretary of State's duty of candour within the closed material procedure, those in the position of the appellants are adequately protected because the court will not countenance an abuse of its process. Thirdly, the Secretary of State, when dealing with serious allegations made by suspected terrorists, ought not to be put in the position of having to elect between disclosing the essence of the case on the abuse issue and discontinuing reliance on that case. In this regard, Mr Eadie emphasises the seriousness of the unappealed findings of national security risk posed by these appellants, particularly the "overwhelming" case against MAM. Fourthly, he refers to Tariq v Home Office [2012] 1 AC 452 as an example of a case in which the Secretary of State has succeeded in resisting being put to her election. Fifthly, he seeks to limit the scope of El-Masri on the ground that it was not concerned with a closed material procedure and, more grandiloquently, "it ought not to be bandied about too freely".

16. I have come to the conclusion that these submissions fail and that, with the greatest respect, the judge ought not to have countenanced such a radical departure from procedural and constitutional normality. It is no answer that terrorism is horrendous and that the unappealed factual findings against these appellants are of considerable gravity. That was the subtext which prevailed prior to A v United Kingdom and AF (No. 3). However it was not permitted to prevail in, for example, Mullen, where the conviction and 30 year sentence were quashed, notwithstanding the appellant's undisputed involvement in terrorism. However grave the case, there can come a point where "the court's sense of justice and propriety is offended": Warren v Attorney General for Jersey [2012] 1 AC 22, per Lord Dyson, at paragraph 35. In my judgment,

to differentiate between allegations against a suspected terrorist and the case for the Secretary of State in opposition to an abuse of process application, is too fine a distinction. The abuse of process application, if successful, would have resulted in the quashing of the control orders and the TPIMs, notwithstanding the gravity of the findings against the appellants. The existence of the statutory closed material procedure had the effect of limiting the obligation of disclosure to the appellants and of permitting much of the detail to be dealt with only in a closed judgment. However, that does not give rise to tolerance, in relation to a potentially dispositive issue, of the total withholding of the Secretary of State's case on collusion and mistreatment or the total confinement of the reasons for rejecting the appellants' case on those issues to the closed judgment.

17. I do not accept that there is a principle which protects the Secretary of State from being required to elect between a modicum of disclosure and withdrawing from reliance on the wholly undisclosed material in circumstances such as this. Election might well be required in relation to the criminal prosecution of an alleged terrorist or, for that matter, in relation to a control order or TPIM in relation to which the Secretary of State would be required to make under AF (No. 3) disclosure or not to rely on the material in question. It would be no answer in those situations to say that there is sufficient protection in the duty of candour to the court. Nor is it an answer that, in the present case, the appellants, in the instigation of the abuse of process application, have had every opportunity to set out their positive case on abuse when they know nothing of the Secretary of State's case on collusion and mistreatment and nothing of the judicial reasoning which resulted in the rejection of their case.

18. Tariq, it seems to me, was a different case. It concerned a civil claim, mainly in reality for compensation, which Mr Tariq chose to bring in the context of a specific statutory procedure. It did not involve his personal liberty. Here, the underlying proceedings are ones in which the Secretary of State is seeking to restrict the liberty of the appellants and the abuse of process application is a potentially dispositive form of attempted resistance to proceedings in which the appellants did not choose to engage.

19. I do not consider El-Masri to be a new panacea for the uninformed. It no doubt has its limits. However, the express inclusion of the criterion of maintaining public confidence in adherence to the rule of law is apt. It reflects what Lord Phillips said in AF (No. 3), at paragraph 63:

> "Indeed, if the wider public are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust."

20. Lurking just below the surface of a case such as this is the governmental policy of "neither confirm nor deny" (NCND), to which reference is made. I do not doubt that there are circumstances in which the courts should respect it. However, it is not a legal principle. Indeed, it is a departure from procedural norms relating to pleading and disclosure. It requires justification similar to the position in relation to public interest immunity (of which it is a form of subset). It is not simply a matter of a

governmental party to litigation hoisting the NCND flag and the court automatically saluting it. Where statute does not delineate the boundaries of open justice, it is for the court to do so. In the present case I do not consider that the appellants or the public should be denied all knowledge of the extent to which their factual and/or legal case on collusion and mistreatment was accepted or rejected. Such a total denial offends justice and propriety. It is for these fundamental reasons that I consider the appellants' principal ground of appeal is made out. The approach to their abuse of process applications was largely flawed. I make no comment on the merits of those applications.

21. I have reached this conclusion without the need to consider further points advanced by Mr Otty in support of the primary ground. However, he raises points which merit consideration and I now turn to them:

(1) Burden of Proof

In his judgment, Lloyd Jones LJ referred to "the high threshold which must be crossed to render these proceedings an abuse of process" (paragraph 135). Earlier, he had said (at paragraph 87):

> "… while the court will always be mindful of the limitations arising from the fact that certain relevant material cannot be disclosed to the [appellants], I do not consider that it is necessary to modify the well-established principles in relation to the burden of proof in abuse of process applications in order to maintain the essential fairness of the trial. "

22. In attacking this approach, Mr Otty seeks to rely on A v Secretary of State for the Home Department (No. 2) [2006] 2 AC 221, especially the speech of Lord Bingham (at paragraphs 55 and 56).

23. There is an obvious difference between A (No. 2) and the present case. There the appellants were asserting that certain evidence to be used against them was obtained from third parties by torture. In those circumstances, it is unsurprising that, subject to an evidential burden, Lord Bingham considered that the conventional approach to the ultimate burden of proof might need modification. The difference between that and the present case is that here the appellants were advancing a positive case of, among other things, collusion and mistreatment based, at least in the first instance, on their own evidence (although, in the event, neither entered the witness box).

24. I regard the burden of proof issue in the present circumstances to be inextricably linked to the fundamental issues with which I have dealt. If I had come to the same conclusion as the judge about them, I might have been persuaded that, denied all knowledge of the Secretary of State's case, the appellants' disadvantage should have been mitigated by the adoption of a more inquisitorial approach. However, if they are to have the additional procedural protection which I hold to be appropriate, including

the gisting of the Secretary of State's case on collusion and mistreatment, there is not the same need to modify the conventional approach to the burden of proof. In short, having succeeded on the more fundamental ground, this complaint about the burden of proof loses some of the validity which it might otherwise have had.

(2) Proper Purpose

The case for the appellants under this heading is that the purpose of the control order and TPIM legislation is to restrict the liberty of suspected terrorists in the United Kingdom and that, accordingly, the measures were being deployed for an improper purpose, namely to restrict the liberty of the appellants in the United Kingdom at a time when they wish to be elsewhere and in relation to the prevention of terrorism in East Africa. This is, by taxonomy, a simple Padfield v Minister of Agriculture point: [1968] AC 997. The submission is simple but, in my judgment, it is wrong. Whilst it is true that the allegations against the appellants relate to the furtherance of terrorism elsewhere, and they would not have been in the United Kingdom at the time of their return but for the security operation in Somaliland which resulted in their involuntary return, I do not consider the narrowness of their case on purpose to be correct. They are British citizens. There is a strong factual case against them in relation to "terrorism-related activity", which is defined widely in section 1 (9) of the Prevention of Terrorism Act 2005. It includes the provision that "it is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism generally". It is common ground that extraterritorial acts of terrorism are included. It is true that control orders and TPIMs only take effect within the jurisdiction – thus, for example, there is a requirement of personal service – but, all other things being equal, there can be no complaint that the alleged overt acts related to overseas activity. Again, it seems to me that this point falls away if the appellants are successful in relation to their fundamental abuse of process point. There can be no objection to imposing a control order or TPIM on a British citizen against whom reasonably suspected terrorism-related activity and the requisite threat to national security are well established, absent an abuse of process. If the appellants were the objects of such an abuse, this submission adds nothing. If they were not, it gives them no ground of complaint.

(3) The status of Somaliland

I do not consider it necessary to give further consideration to this complex issue which, in my judgment, does not add to the appellants' case on abuse of process.

2. Failure to take account of Somaliland matters

25. If I am right about abuse of process, this ground of appeal becomes a superfluous alternative. Its underlying assumptions are that (1) the Secretary of State did not abuse the process of the court but (2) the arrest, detention and deportation of the appellants were in breach of Somaliland law. This second assumption, which the judge first referred to at paragraph 134 when considering abuse of process, was revisited for present purposes at paragraph 153, where the judge was considering the consequences

of the Secretary of State's failure to have regard to "the Somaliland matters" when deciding whether to impose the control orders or the TPIMs. He said:

> "I accept the submission based on a failure to take account of a relevant consideration in the exercise of a discretion is of wider scope than the submission based on an abuse of process. Furthermore, I am prepared to assume for present purposes, without deciding the point, that the Somaliland matters were matters which the Secretary of State was required to take into account in exercising her discretion as to whether to impose control measures. It is therefore necessary to consider whether the Secretary of State might have exercised her discretion differently had she been advised that the Somaliland matters were relevant or had she been aware that there was an issue as to whether the deportations were in accordance with the local law. However, I have come to the clear conclusion that the Secretary of State would inevitably have exercised her discretion in precisely the same way had she taken account of these matters."

26. The appellants criticise this passage in two ways. First, they submit that if there was a legally flawed exercise of discretion, there was no alternative but to quash. Secondly, it is said that, even if there was a broader discretion, the judge was wrong not to quash.

27. The first submission centres upon construction of the statutes. Section 3 of the Prevention of Terrorism Act 2005 provides:

> "(12) If the court determines…that a decision of the Secretary of State was flawed, its only powers are –
>
> (a) power to quash the order;
> (b) power to quash one or more obligations imposed by the order; and
> (c) power to give directions to the Secretary of State for the revocation of the order or for the modification of the obligations it imposes.
>
> (13) In every other case the court must decide that the control order is to continue in force."

28. The TPIM Act, section 9(5) – (7) is to similar effect. Its expression is slightly different but the difference is not material. The question, in both cases, is whether the statute excludes a discretion not to quash in the event of a finding of a legal flaw. In support of the submission that there is no power to refuse to quash, the appellants rely on AT and AW [2009] EWHC (Admin) 512 and AN v Secretary of State for the Home Department [2010] EWCA Civ 869. In my judgment, such reliance is misplaced. In AT and AW, Mitting J was not satisfied that the Secretary of State would have made the same decision but for the flaw. Moreover, paragraph 19 of his judgment, read as a whole, is not inconsistent with the approach of the judge in the present case. AN simply did not address this issue. Its parameters were confined to the

choice between quashing and revocation, it being common ground that, in the circumstances of the case, the Secretary of State would not eschew both. It is plain to me that, as Mr Eadie submits, the statutory provisions do not oblige the court to quash or revoke. The language is that of "powers" not obligations. I do not consider that the significance of this is diluted by the fact that section 3(12) refers to "the only powers". It would be astonishing if, in a jurisdiction which is modelled on judicial review, the court was being denied the discretion to refuse a remedy without clear provision to that effect. Significantly, where section 3 is intended to remove discretion from the court, it expressly so provides: for example, section 3 (13) and section 3 (14)– "the court must discontinue…". Section 3 (12), on the other hand, simply limits the form of remedies which can be granted. It does not deny the withholding of such remedies. If the available remedies are withheld, then, in accordance with section 3(13), "the court must decide that the control order is to continue in force".

29. The second submission, which relates to the judge's exercise of discretion, is equally unsustainable. Even on the assumption of illegality on the part of the Somaliland authorities, the judge was plainly entitled to conclude that, absent abuse of process on the part of the Secretary of State, she would have exercised her discretion in the same way with Somaliland illegality taken into account. It is impossible to envisage a Secretary of State coming to a different conclusion in the light of the accepted evidence of terrorism-related activity and risk to national security. These are unassailable factual matters beyond the purview of this court.

3. Non-disclosure to Silber J at the permission stage

30. This ground of appeal relates only to the control orders and not to the TPIMs. At the later stage, there was no finding of non-disclosure. However, the control orders did not cease to have legal consequences upon their expiration. In particular, criminal liability for breach of an order while still extant remains a live issue. Thus, if a control order is not quashed on other grounds, this ground might have continuing materiality.

31. The permission stage is important in control order proceedings. Although it is the Secretary of State alone who is empowered to make a non-derogating control order (PTA, section 2), she cannot do so unless she first obtains permission from the court: section 3 (1). Section 3 then continues:

> "(2) where the Secretary of State makes an application for permission…, the application must set out the order for which he seeks permission and –
>
> (a) the function of the court is to consider whether the Secretary of State's decision that there are grounds to make the order is obviously flawed;
> (b) the court may give that permission unless it determines that the decision is obviously flawed;

(c) if it gives permission, the court must give directions for a hearing in relation to the order as soon as reasonably practicable after it is made.

(5) The court may consider an application for permission…

(a) in the absence of the individual in question;
(b) without his having been notified of the application…; and
(c) without his having been given an opportunity…of making any representations to the court…"

Thus, the scheme provides for an application without notice and with a relatively low level of scrutiny - "obviously flawed". Nevertheless, it was appropriately described by Lloyd Jones LJ as "an important constitutional safeguard" (paragraph 175 (2)).

32. Basing himself on authorities such as Re Stanford International Bank Ltd [2010] CH 33 (per Hughes LJ at paragraph 191) and Re Crown Court at Lewes, ex parte Hill (1991) 93 Crim App R 60 (per Bingham LJ at page 69), the judge said:

> "121. It is well established that a party seeking relief from the court on a "without notice" application is under a duty to make a full, fair and accurate disclosure of all material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case. Furthermore, the applicant must act with the utmost good faith and is obliged to give full and frank disclosure of all matters which the absent parties could be expected to make had they been present…
>
> 163. These principles undoubtedly apply in their full rigour to applications to the court to make a control order or TPIM. Indeed, this may be thought to be an a fortiori case bearing in mind the high degree of resulting interference with individual liberty and the likely substantial delay before an inter partes hearing takes place… I consider that the obligation in the present case was not limited to drawing the court's attention to all matters relevant to the statutory criteria but also extended to require disclosure of matters which would be capable of founding an argument of abuse of process."

I respectfully agree with this exposition. Moreover, I do not consider that relief from the obligation of candour is excused simply on the basis that, at the time, the Secretary of State was subjectively unaware of the abuse of process jurisdiction.

33. When the application for permission was made, contingently, in the case of MAM on 13 January 2011, Silber J was simply told that the Secretary of State understood that:

> "[MAM] will be imminently arrested in Somaliland and it is possible that he will be deported from Somaliland to the UK. This order will only be served if [he] returns to the UK from Somalia."

By the time that the application was made in relation to CF on 13 April 2011, he had been detained in Somaliland, then returned to the United Kingdom and imprisoned for absconding from trial. The only information relating to the Somaliland matters given to Silber J on 13 April 2011 was:

> "Although this has no bearing on the decision to make a control order, the Secretary of State is aware of pre-action correspondence sent to other government departments by [CF] relating to the circumstances and the conditions of his arrest in Somaliland. This was responded to by the Treasury Solicitor's Department on 15 March 2011 and the claimant has not to date sought to take this matter further."

Lloyd Jones LJ considered the disclosure made to Silber J on both occasions to be "deficient" (paragraph 172). He then turned to the question whether this non-disclosure should result in the quashing of the control orders but not the subsequent TPIMs, by which time the disclosure was sufficient. Again, the practical consequence of quashing would go to the potential issue of criminal liability for breach of the orders.

34. The judge considered (at paragraph 174) that the principles relating to the consequences of material non-disclosure in criminal and private law cases should be modified in the control order context "to permit the court to take account of the purpose of the legislation and the public interests which are in play". He continued (at paragraph 175):

> "…I have had regard to the following considerations:
>
> (1) The making of the control orders resulted in a considerable interference with the civil liberties of the [appellants].
>
> (2) The fact that a control order…can only be made with the permission of a High Court judge is an important constitutional safeguard. If it is to be effective the judge must be fully informed of the relevant circumstances.
>
> (3) However, the applications to the court for permission to make control orders were not an abuse of process, for the reasons set out in my open and closed judgments.

> (4) …I do not consider that the non-disclosure was deliberate. There is nothing in the materials I have seen to support the view that this was a deliberate attempt improperly to manipulate the process. On the contrary, all the indications are that the view was genuinely but erroneously held that the matters which were not disclosed had no bearing on the court's decisions.
>
> (5) These statutory powers are conferred on the Secretary of State to enable her to act to protect the public from terrorism-related activity. In the present case she concluded that these measures were necessary for the protection of the public. These considerations necessarily weigh very heavily in the exercise of my discretion, not least when I have regard to the strength of the evidence on which these conclusions were reached.
>
> (6) I note that even in the context of private civil claims where non-disclosure has resulted in the grant of an injunction it does not necessarily follow that the court must discharge the injunction (Brinks Mat Ltd v Elcombe [1988] 1 WLR 1350 at pp 1357E, 1358 C-G)."

Applying this approach, he exercised his discretion by refusing to quash the control order for non-disclosure.

35. If, as I have held, the applications for control orders were an abuse of process, that would infect the validity of the exercise of discretion because it would give a different value to consideration (3). Quite apart from that, however, it seems to me that other aspects of the judge's approach were erroneous.

36. Considerations (1) and (2) are undoubtedly appropriate. Moreover, in relation to consideration (2), the correctness of the judge's observation that, for the "important constitutional safeguard" to be effective, the judge must be fully informed of the relevant circumstances, underlines its significance. Put another way, absent full disclosure of material facts, the constitutional safeguard soon becomes ineffective.

37. Consideration (5) calls for caution. In every case in which a control order has been made the Secretary of State will have been satisfied as to the statutory criteria, including necessity as to the protection of the public. By itself, that cannot be accorded great weight if the important constitutional safeguard is to be effective. I accept that the evidence in relation to the statutory criteria is strong in the present case but there are obvious dangers to procedural integrity in according too much weight to that where material non-disclosure has occurred. The judge does not seem to have

accorded any weight to the facts that (1) at the time of this consideration, the appellants were subject to later TPIMs which were not tainted by non-disclosure, with the result that the main significance of quashing the control orders for reasons of non-disclosure was related to the ancillary issue of prosecutions for their breach rather than ongoing public protection; and (2) in any event, if a control order or, for that matter, a TPIM were to be quashed for non-disclosure, that would not prevent the Secretary of State from reapplying for permission with proper disclosure. Indeed, since the normal practice in cases raising a challenge to an extant TPIM is for the Secretary of State to see an embargoed copy of the judgment before it is seen by the suspected terrorist, she could ensure continuity of public protection where it is merited.

38. Other matters are relevant. The judge did not consider, or at least makes no reference to having considered, whether Silber J would have granted permission if full and proper disclosure had been made to him. I regard it as improbable that he would have done so, at least without further inquiry. Moreover, the observation in consideration (6) that "even in" the context of private civil law claims, non-disclosure does not necessarily result in the discharge of an order made without notice calls for rigorous analysis. A typical private law case will have the features of an early return date on notice and no interference with personal liberty. In those respects, the control order context calls for a more rather than a less protective approach. Without it, considerations (1) and (2) can be undermined.

39. For all these reasons (which are augmented in the closed judgment), I consider that the judge's approach and conclusion on this issue were legally flawed. Whether or not there was an abuse of process, he ought to have quashed the expired control orders for material non-disclosure. By a respondent's notice, the Secretary of State sought to argue that there is no jurisdiction to quash for non-disclosure. Mr Eadie made no oral submission in support of that contention. I am satisfied that it is wrong because the important constitutional safeguard would be toothless without an inherent jurisdiction to underwrite it, where appropriate.

4. **CF's additional grounds of appeal**

40. In addition to sharing with MAM the grounds of appeal so far considered, CF seeks to rely on additional grounds of his own. They concern complaints that (1) there was insufficient particularity in the allegations of terrorism-related activity and (2) in any event, he was provided with insufficient detail of the closed case against him to satisfy the AF (No. 3) requirement.

(1) Particularity

The allegations against CF were formulated in an amended statement as follows:

> "The Security Service assesses that [CF] has:

(a) Attempted to travel to Afghanistan to fight jihad and engage in suicide operations;

(b) Undertaken terrorist training in Somalia after June 2009;

(c) Fought in Somalia alongside Al-Shabaab after June 2009;

(d) Provided advice on travelling to Somalia to other individuals;

(e) Attempted to recruit fighters in the UK for fighting overseas;

(f) Potential involvement in attack planning."

Mr Friedman focuses on paragraph (b)-(f) for the obvious reason that the Afghanistan allegations in paragraph (a) were the subject of the criminal trial from which CF absconded in June 2009. The amended statement augmented paragraph (a) with a detailed summary of that allegation which the Secretary of State continues to press notwithstanding CF's acquittal in absentia. She is undoubtedly entitled to do so.

As regards paragraph (b)-(f), the amended statement contains additional details, sometimes with a degree of particularity, sometimes not. In relation to paragraphs (b) and (c) it asserts that, having absconded from his trial, CF

> "travelled to Somalia where he attended a terrorist training camp … he left the UK using a false Portuguese passport … he did not leave the UK through usual methods … he may have been assisted in his abscond by the extremist network of which he is part …
>
> … between June 2009 and January 2011 [he] was involved in terrorist training and fighting alongside Al-Shabaab with other Islamist extremists … there may have been times during this period when [he] was not involved in Islamist extremist activities."

The amended statement also names a number of CF's associates and identifies them as Islamist extremists.

41. The allegations in paragraph (d) and (e) are less particularised. The amended statement states:

> "[CF] has been involved in the recruitment and facilitation of individuals for terrorist-related activity, including providing advice to others on travelling to Somalia … [he] wanted to

> assist some of his sister's and [a named person's] travel to Somalia for terrorism-related activity.
>
> … [he] has been involved in fundraising for Al-Shabaab."

The allegation in paragraph (f) is fleshed out in detail by reference to the events of January 2011 and CF's association with MAM, in respect of whom more detailed information was provided.

42. In submitting that the particularisation of the allegations against CF was insufficient, Mr Friedman refers to a number of Strasbourg and domestic authorities but now places greatest reliance on AT v Secretary of State for the Home Department [2012] EWCA Civ 42, which was decided some months before the hearing in the Administrative Court in the present case but does not appear to have been cited there. In my judgment, it does not assist CF. It did not, as Mr Friedman does in relation to this point, focus exclusively on the particularity of the open allegation which, in AT, was simply remaining "a significant and influential member of the LIFG". Its primary concern was with the question whether, given the vagueness of that open allegation, there had been proper AF (No. 3) disclosure of the closed material which, it was apparent from the open judgment, had played a significant part in the determination of the first instance judge.

43. In my judgment, the free-standing submission that the open particularisation of the case against CF was inadequate is unsustainable. In its own terms, and standing by itself, the amended statement contained sufficient particulars of the open case. The more important question is whether, to the extent that closed material was relied upon (as it plainly was), there was sufficient disclosure of it to satisfy AF (No. 3).

(2) AF (No. 3)

I refer to and set out again the test adopted by Lord Phillips (at paragraph 59).

> "… the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controllee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general material and the case against the controllee is based solely or to a decisive degree on closed material, the requirements of a fair trial will not be satisfied, however cogent the case based on the closed material may be."

For present purposes, I shall assume that some of the open allegations consist "purely of general assertions" and that the case against CF in relation to them is based "solely or to a decisive degree" on closed material.

44. The first thing to keep in mind about this situation is that AF (No. 3) disclosure is judicially controlled. Thus, in the present case, the Secretary of State was ordered to provide, and did provide, further disclosure in order to satisfy the requirement. As an appeal to this Court lies only on a point of law, there are formidable difficulties in challenging on appeal disclosure decisions made by specialist judges. This was foreseen by Lord Brown in AF (No. 3) at paragraph 121. Nevertheless, legal error can still occur. AT (above) is an example, although the first instance judge there had the misfortune of having to deal with the issue at a point in time between A v United Kingdom and AF (No. 3).

45. In relation to some of the allegations, and particularly in relation to the Afghanistan stage, the Secretary of State's open statements contained sufficient disclosure in themselves. As to the more controversial Somalia allegations, the Secretary of State's skeleton argument makes these points:

> "… it is simply not true that the open allegations were of a comparable level of generality to the allegations of continuing LIFG membership that was at issue in AT … CF was told when the terrorist training and fighting was alleged to have occurred – i.e. during an 18 month period between June 2009 and January 2011, where it was said to have taken place – i.e. in Somalia, and with whom it was said to have taken place – in general, with members of Al-Shabaab, but note also the allegation that CF trained with two named individuals."

I am entirely satisfied that these points are well-made and that disclosure in relation to terrorist training and fighting in Somalia was sufficient, as also was disclosure in relation to the events of January 2011 and the association with MAM. As the Afghanistan, Al-Shabaab and January 2011 matters would, without more, have inevitably been sufficient to justify the control order and the TPIM in CF's case, the less specific disclosure in relation to recruitment, travel advice and fund-raising loses its significance, although the reference to travel assistance did include the identification of its recipients.

46. In addition, it is a striking feature of the case that CF, although he chose not to give oral evidence, was able to make statements running to well over 100 pages in total, plus exhibits, giving his account in relation to the allegations against him. They leave no impression that CF was a man who did not know or have the ability to deal with the case against him. There is also assurance in the judge's observation (at paragraph 53) that:

> "… disclosure has been the subject of a series of interlocutory meetings … Furthermore, I have kept disclosure under review

> throughout the substantial hearing. I am satisfied that appropriate disclosure has been made … in accordance with AF (No. 3).”

Needless to say, if the Special Advocates considered that there was any legal error in the disclosure rulings, they would pursue it by way of closed grounds of appeal. This open ground of appeal is utterly unsustainable.

Conclusion

47. It follows from what I have said that I would allow the appeals of both appellants in relation to abuse of process and non-disclosure to Silber J but I would dismiss all other grounds. The success of the ground in relation to non-disclosure to Silber J in the form in which I have expressed it must lead to the quashing of the control orders.

48. The final question is as to the consequences of the appellants’ success on the abuse of process ground. It is not for us to decide whether there was or was not an abuse of process. In my view, the appropriate course is to remit the case to the Administrative Court so that the whole issue of abuse of process can be reconsidered in the light of this judgment. It does not follow from the fact that we have dealt with the appeal of MAM notwithstanding his unknown whereabouts that the Administrative Court will do so. Nor does our decision seek to influence future consideration of his public funding.

Lord Justice Sullivan.

49. I agree.

Lord Justice Briggs.

50. I also agree.